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No. 276

In the Supreme Court of the United States

OCTOBER TERM, 1967

RAYMOND HOPKINS, PETITIONER

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR RESPONDENT

On July 2, 1964, claimant Raymond Hopkins instituted an action in a federal district court under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to obtain review of a determination by the Secretary of Health, Education and Welfare that he was no longer entitled to disability benefits under Section 223 of the Social Security Act, 42 U.S.C. 423 (Pet. App. 1a–2a). On September 30, 1965, the district court entered an order reversing the Secretary's determination and directing the Secretary to "pay disability benefits to the plaintiff from the time of their termination until such time as a new determina-

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tion is made that plaintiff's disability has, in fact, terminated" (Pet. App. 9a).

Counsel for the claimant had earlier, in May 1964, entered into a contingent fee agreement with the claimant and his wife, providing for a minimum fee of 40 per cent of accrued benefits. But the district court, relying on Section 206(b)(1) of the Act, added in 1965,[1] awarded counsel a fee of 25 per cent of the past-due benefits payable to claimant Hopkins (Pet. App. 10a–12a).

Counsel appealed, contending that the district court should have awarded him a fee based not only on the accrued disability benefits payable to claimant Hopkins but also on the accrued benefits payable to his dependent wife and children. The court of appeals affirmed, noting that it was "unlikely that Congress intended that in a case like this the maximum fee should be more than twice as large as it would have been if Mr. Hopkins happened to be single" (Pet. App. 20a).[2] Counsel then filed the instant petition in the name of the claimant.

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[1] Section 206(b)(1) (42 U.S.C. (1965 Supp.) 406(b)(1)) provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

[2] Counsel for claimant also argued in the court of appeals

We believe that the decision below is correct. It conforms to the clear language of Section 206(b)(1)—which expressly limits the award of fees to a percentage of benefits payable to "claimant"—and effectuates the congressional purpose of limiting the payment of "inordinately large fees" out of social security funds. See S. Rep. No. 404, 89th Cong., 1st Sess., p. 122.[3] However, as the court below noted, a contrary view has been expressed by the Court of Appeals for the Fourth Circuit. *Lambert* v. *Celebrezze,* 361 F. 2d 677, and *Redden* v. *Celebrezze,* 361 F. 2d 815, both reaffirmed on rehearing *en banc* in 370 F. 2d 373.

In view of the substantial number of social security cases, the issue of the proper construction of the 25 per cent limitation on counsel's fees imposed by the 1965 amendments is bound to recur. And there is an acknowledged conflict in approach among the circuits. At the same time, however, we point out that the Fourth Circuit has not as yet actually sanctioned any award in excess of 25 per cent of the claimant's own benefits. In *Redden,* indeed, the court indicated that in the circumstances of that case an award exceeding that figure would be improper (370 F. 2d at 376); in *Lambert* it had no occasion to pass on an actual award. We believe that in practice the Fourth Circuit

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that Section 206(b)(1)—which became effective on July 30, 1965—was inapplicable to a prior contingent fee arrangement. The court of appeals rejected this contention and counsel has apparently abandoned it here.

[3] Only last month, the Court of Appeals for the Sixth Circuit, in *Sims* v. *Gardner*, No. 17356, adopted the view of the court below. We have reprinted its opinion in the Appendix, *infra*, pp. 5–9.

will be very reluctant to approve any awards that amount to more than 25 per cent of the claimants' benefits standing alone. Moreover, now that the Sixth and Seventh Circuits have adopted the contrary construction, the Fourth Circuit may reexamine its position. These considerations suggest that this Court might deem it appropriate to deny review of this case notwithstanding the existence of a conflict in principle.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1967.

APPENDIX

United States Court of Appeals for the Sixth Circuit

No. 17356

PEARLIE SIMS, WIDOW AND NEXT OF KIN OF ALFRED SIMS, PLAINTIFF-APPELLANT

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT-APPELLEE

On appeal from the United States District Court for the Eastern District of Tennessee, Southern Division

Decided June 10, 1967

Before WEICK, Chief Judge, MCCREE, Circuit Judge, and KENT, District Judge,[1]

MCCREE, *Circuit Judge:* This appeal, though captioned in the name of Pearlie Sims, is actually the appeal of her attorney, who disputes the amount of the fee fixed for him by the district court under 42 U.S.C. § 406(b)(1) following his successful district court challenge of the Secretary's denial of social security disability insurance benefits to Mrs. Sims' husband. Upon the husband's death, Mrs. Sims had been

[1] Honorable W. Wallace Kent, Chief Judge, United States District Court for the Western District of Michigan, sitting by designation.

substituted as plaintiff in a representative capacity in the district court proceedings. The court fixed the attorney's fee at "twenty-five percent of the sum recovered of the defendant by the plaintiff." The attorney moved for a supplemental order providing that he should receive 25 percent not only of the amount to which Mr. Sims was entitled, but also of the amounts which Mr. Sims' dependents might, upon application, receive as a result of Mr. Sims' award. The district court denied this motion.

The statute which the attorney claims the district court to have erroneously construed reads in pertinent part as follows:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment. * * * 42 U.S.C. § 406(b)(1).

The Courts of Appeals of two circuits have already considered the question of the basis to which the statutory percentage is to be applied in determining the maximum attorney's fee. The Seventh Circuit, in *Hopkins* v. *Gardner*, —— F. 2d —— (1967), has held, in accord with the ruling of the district court in the present case and with the position urged by the Secretary in this appeal, that the maximum attorney's fee should be 25 percent of the past-due benefits payable to the insured only. The Fourth Circuit in *Lambert* v. *Celebrezze*, 361 F. 2d 677 (1966) and *Redden* v. *Celebrezze*, 361 F. 2d 815 (1966) *rehearing denied en banc*, 370 F. 2d 373 (1966), has agreed with the attorney in this case that the maximum should be 25 percent of the amount payable to the insured and also of the amount

which may be payable to his dependents as a consequence of the judgment in his favor.

It is noteworthy that in any given case, the Fourth and Seventh Circuits might arrive at the same dollar amount in determining the appropriate fee. Although the Fourth Circuit uses a larger basis, it recognizes that "the statute requires that the judge determine a reasonable fee," and that such a fee might be substantially less than 25 percent of the amount payable to the insured. 370 F. 2d at 376. The Seventh Circuit, on the other hand, suggests that if an attorney must prove a matter such as the relationship of a purported dependent to the insured, the court can take the dependent's benefits into account in determining the attorney's fee. —— F. 2d at ——. Hence, it may be said that the issue between the two circuits is whether, as a matter of law, the court, in setting the attorney fee should be precluded from taking certain amounts into consideration in the absence of special circumstances justifying the inclusion of those amounts. With deference to the Court of Appeals for the Fourth Circuit, we believe the solution of the Seventh Circuit is more closely in accord with both the plain language of the statute and with the policy which the statute was designed to further.

The reference in the statute to a judgment "favorable to a claimant under this subchapter" is of little help in solving our present problem, since both the insured and his dependents may qualify as "claimants." 42 U.S.C. §§ 402, 405 (b), (g). It is also of scant assistance that the statute requires the claimant to have been "represented before the court by an attorney," since, as both the Fourth and Seventh Circuits have noted, it is not difficult under the social security statutes to add the dependents as parties. 42 U.S.C. § 405(g). It does seem significant, however, that the

statute refers to "the past-due benefits to which the claimant is entitled by reason of such judgment." In a case such as the present one, the insured's dependents are not "entitled" to benefits as a result of a judgment in favor of the insured. This judgment is certainly helpful in paving the way for the payment of benefits to the dependents, but the dependents must still satisfy the Secretary as to their relationship to the insured and other statutory requirements. 42 U.S.C. § 402(b)–(h).

It may be observed that the Fourth Circuit, in determining that the benefits payable to both the insured and his dependents might be considered in fixing fees, stated, "We assume, of course, the absence of any question that the children listed by Redden are his and are dependents." 370 F. 2d at 375. This assumption presents certain difficulties, as the district judge recognized in the present case in his memorandum accompanying the order denying the request for additional fees:

> Dependents must establish the relationship required by statute and such relationship is at times denied by the government. There is always the possibility that dependents might have the need of representation in establishing their own rights to the payment of benefits based on another's claim, and if such representation were by a different person, or in a different proceeding, those beneficiaries' benefits could be taxed with fees above and beyond those contemplated by the statute. * * *

Even if the district court could be certain that the question of the insured's disability was the only precondition to the receipt of benefits by the dependents, we would refrain from holding that a court judgment determining the question of disability in favor of the insured would permit the dependents' benefits to be

used in fixing the attorney's fee. Section 406(b)(1) was added to the Social Security Act in 1965 for the purpose of preventing attorneys from receiving "inordinately large fees." U.S. Code Congressional and Administrative News, 89th Cong., 1st Sess., 1965, p. 2062. This court is mindful of the fact that attorneys representing social security claimants often perform arduous work in return for compensation which cannot, in any absolute sense, be termed "inordinately large." Attorneys' fees in this area, however, cannot be viewed in a vacuum, but must be examined in relation to the needs of the claimants. When so viewed, it is apparent that an increase in fees for court representation based upon the fortuity of the insured having dependents would defeat the purpose of the statute. If dependents do receive benefits, the attorney will of course be able to obtain the compensation provided by the statutes and regulations for representation before the Secretary; but only if the attorney is required to raise in the district court such issues as the relationship of a dependent to the insured should the dependent's benefits be considered "benefits to which the claimant is entitled by reason of" the judgment of the court.

The judgment of the district court is affirmed.

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